



THE STATE BAR  
OF CALIFORNIA

INTER-OFFICE  
COMMUNICATION

**DATE:** June 19, 2008

**TO:** Members of the Board Committee on Regulation,  
Admissions and Discipline Oversight

**FROM:** Scott J. Drexel, Chief Trial Counsel

**SUBJECT:** Proposed Addition of Rule 2.40 to the Rules of the State Bar of California  
Re Voluntary Resignations and Proposed Approval of Voluntary Resignation  
Form – Request for Release for Public Comment

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***ISSUE***

In the last twelve months, there have been at least five attorneys who have tendered voluntary resignations from the State Bar of California without disciplinary charges pending when, in reality, at the time they tendered those resignations, they had already either been charged with or convicted of serious felony offenses. In each case, the State Bar was compelled to ask the Supreme Court to vacate its order accepting each member's resignation without charges pending. The Supreme Court has expressed its concern about these improper resignations and has asked the State Bar to consider the adoption of a rule that would require members who wish to tender a voluntary resignation to declare, under penalty of perjury, that there are no criminal investigations or charges pending against them and that they have not been convicted of any crime that is required to be reported to the State Bar pursuant to Business and Professions Code section 6068, subdivision (o)(5).

The issue presented by this agenda item is whether the Board Committee on Regulation, Admissions and Discipline Oversight ("RAD Committee") should release proposed rule 2.40 of the Rules of the State Bar of California, in the form attached hereto as Appendix A, and a proposed Voluntary Resignation form, in the form attached hereto as Appendix B, for a 45-day public comment period.

***RECOMMENDATION***

The Office of the Chief Trial Counsel recommends that the RAD Committee authorize the release of proposed rule 2.40 of the Rules of the State Bar of California and of the proposed Voluntary Resignation form, in the form attached hereto as Appendix A and Appendix B respectively, for a 45-day public comment period.

## *DISCUSSION*

An attorney is not entitled to voluntarily resign from the State Bar of California without disciplinary charges pending if he or she is currently (1) suspended from the practice of law as a result of the imposition of discipline; (2) on disciplinary probation; (3) criminally charged with or convicted of a crime that must be reported to the State Bar pursuant to Business and Professions Code section 6068, subdivision (o)(5)<sup>1</sup>; or (4) has a disciplinary complaint, investigation or proceeding pending against him or her. If one or more of these circumstances exist, the attorney who desires to resign from the State Bar of California must tender his or her resignation in accordance with the requirements of rule 9.20 of the California Rules of Court.

As mentioned above, during the past twelve months, there have been at least five attorneys who have tendered voluntary resignations without charges pending to the State Bar of California but who were not eligible to resign without charges pending because they had either been charged with or convicted of one or more felonies that were required to be reported to the State Bar pursuant to Business and Professions Code section 6068, subdivision (o)(5).

As a result of the failure of these members to report to the State Bar their convictions and/or the filing of the felony charges against them as required by section 6068, subdivisions (o)(4)<sup>2</sup> and (o)(5), the State Bar's Office of Member Services erroneously processed their respective resignations as voluntary resignations without disciplinary charges pending. However, when the Office of the Chief Trial Counsel and the Office of General Counsel subsequently learned of these members' criminal convictions, a request was filed in each instance asking the Supreme Court to vacate its earlier orders accepting their respective resignations without charges pending.<sup>3</sup>

The Supreme Court has expressed its concern about these improper resignations without charges pending and has asked the State Bar to consider both a modification of the State Bar's voluntary resignation form as well as the adoption of a rule that would require members tendering a resignation from the State Bar without charges pending to declare, under penalty of perjury, that there are no criminal charges pending against them and that they have not been convicted of a crime that is required to be reported to the State Bar.

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<sup>1</sup> Section 6068, subdivision (o)(5) requires a member to report to the State Bar in writing, within 30 days, of the member's knowledge of "[t]he conviction of the attorney, including any verdict of guilty, or plea of guilty or no contest, of a felony, or a misdemeanor committed in the course of the practice of laws; or in a manner in which a client of the attorney was the victim, or a necessary element of which, as determined by the statutory or common law definition of the misdemeanor, involves improper conduct of an attorney, including dishonesty or other moral turpitude, or an attempt or a conspiracy or solicitation of another to commit a felony or a misdemeanor of that type."

<sup>2</sup> Section 6068, subdivision (o)(4) requires a member to report to the State Bar in writing, within 30 days, of the member's knowledge of "[t]he bringing of an indictment or information charging a felony against the attorney."

<sup>3</sup> The fifth incident (Thomas Whittier Burton, Member No. 55508) was just discovered last week. The Supreme Court has not yet vacated its April 4, 2008 order accepting Mr. Burton's resignation without charges pending.

Currently, there is no rule that addresses the eligibility of a member to voluntarily resign from the State Bar without disciplinary charges pending. Attached as Appendix A is proposed new rule 2.40 of the Rules of the State Bar of California, which would establish both the eligibility requirements for resigning without charges pending and a process for handling those resignations.

If adopted, proposed rule 2.40 would accomplish several objectives. First, subsection (A) of proposed rule 2.40 would define a member's eligibility for tendering a voluntary resignation from the State Bar. Pursuant to proposed subsection (A), a member would not be eligible to tender a voluntary resignation if (1) the member is currently suspended or subject to disciplinary probation or an agreement in lieu of discipline; (2) the member has a pending disciplinary investigation or proceeding against him or her; (3) the member is currently charged with the commission of a crime described in Business and Professions Code section 6068, subdivision (o)(5); or (4) the member has been convicted of a crime described in Business and Professions Code section 6068, subdivision (o)(5) for which discipline has previously been imposed by the State Bar Court or the Supreme Court.

Second, subsection (B) of proposed rule 2.40 would provide for the Board of Governors' adoption of a voluntary resignation form and would require a member who wishes to resign from the State Bar without charges pending to complete and sign the form under penalty of perjury.

Finally, subsections (C) and (D) of proposed rule 2.40 would notify members who tender their resignations that (a) they will be immediately enrolled inactive and will be ineligible to practice law pending Supreme Court action on their resignations; and (b) the resignation will not be effective unless and until it is accepted by the Supreme Court.

Attached hereto as Appendix B is the proposed new Voluntary Resignation form. The current form consists only of the first paragraph of Appendix B. The remainder of the new form, including the declaration under penalty of perjury, is proposed to be added to the form in response to the Supreme Court's request and to ensure that members recognize the limitations upon their ability to resign without charges pending.<sup>4</sup>

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<sup>4</sup> The proposed Voluntary Resignation form does not make any reference to pending attorney disciplinary investigations or proceedings because the Office of the Chief Trial Counsel conducts those investigations and participates in State Bar Court proceedings. Therefore, those matters would be immediately identified and the voluntary resignation would not be processed. However, the Office of the Chief Trial Counsel is not always aware of pending criminal proceedings or convictions. California state courts are required to report attorney convictions to the State Bar (Bus. & Prof. Code, § (c)) and the Office of the Chief Trial Counsel sends an annual letter to all state and federal judges in California asking them to notify the State Bar of such convictions. Nevertheless, not all attorney convictions are reported to the State Bar, especially convictions that occur in other states or in the federal courts outside of California. While making members sign the resignation form under penalty of perjury may not prevent some members from falsely attesting that they have no pending charges or convictions, the Supreme Court will treat such false statements very seriously.

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Admissions and Discipline Oversight  
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***PROPOSED RESOLUTIONS***

If you agree that proposed rule 2.40 of the Rules of the State Bar of California and the proposed Voluntary Resignation form should be released for public comment, your approval of the following resolutions would be appropriate:

**“RESOLVED**, that the Board Committee on Regulation, Admissions and Discipline Oversight hereby authorizes the release of proposed rule 2.40 of the Rules of the State Bar of California and of the proposed Voluntary Resignation form, in the form attached hereto as Appendix A and Appendix B, respectively, for a 45-day public comment period; and it is

**FURTHER RESOLVED** that the release of the aforementioned proposed rule and proposed Voluntary Resignation form does not constitute, and shall not be considered, as approval by the Board of Governors of the State Bar of California of the matters published.”

SJD:dim  
Attachment